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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 526

THE UNITED STATES OF AMERICA, Petitioner,

vs.

CHARLES KRUSZEWSKI.

Response to Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Law Office of:

JOHN V. CLINNIN,
Attorney-at-Law, Of Counsel.

JULIUS L. KABAKER,
Counsel for Respondent,
Member of the Bar of the Supreme Court of the United States.

SAMUEL S. BROWN,
Attorney-at-Law,

All of Chicago, Illinois.
11 So. La Salle Street.

Scheffer Printing Company, Del. 7171

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IN THE

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No. 526

THE UNITED STATES OF AMERICA, Petitioner,

vs.

CHARLES KRUSZEWSKI.

Response to Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Respondent respectfully submits to the Supreme Court of the United States and the Honorable Justices thereof, his opposing brief in the above-entitled case.

I. Opinion.

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals for the Seventh Circuit (Evans and Major, Circuit Judges, and Lindley, District Judge; Circuit Judge Major, writing) was filed on October 13, 1947 and appears at pages 142 to 147 of the record. It is reported in 163 Fed. 2d, 884.

II. Jurisdiction.

The judgment was entered on October 13, 1947. Jurisdiction is invoked in petition under the provisions of

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (347 U.S.C.A. Title 28).

III. Questions Presented.

1. Whether the deficiency appropriation act was such an adjudication by Congress of respondent's claim as will bar a reopening and revision of the settlement of that claim by the Comptroller General.

2. Whether the limitation of one year, contained in Section 8 of the Dockery Act of 1894, on the time within which the Comptroller of the Treasury could revise the settlement of a public account is properly applicable to the Comptroller General, as it has been made applicable in the codification of that section and Section 304 of the Budget and Accounting Act of 1921, 31 U.S.C. 74, so as to bar a revision of the settlement of respondent's claim.

IV. Statutes, Rules and Regulations Involved.

1. The pertinent provisions of the Act of March 26, 1934, c. 87, 48 Stat. 466, as amended, 5 U.S.C. 118 c; Appendix A, petition, p. 25.

2. Section 2 of the Act of July 7, 1884, c. 334, par. 1, 23 Stat. 254, 5 U.S.C. 266—Not Listed on p. 3 in petition; printed below.

3. 31 U.S.C. 714, which repeats as cross-reference in the last sentence the text of 5 U.S.C. 266, and quotes as authority the following statutes:

> Act of June 14, 1878, c. 191, par. 4, 20 Stat. 130; July 7, 1884 c. 234, par. 1, 23 Stat. 234; June 10, 1921, c. 13, par. 304, 42 Stat. 24.
>
> Not listed on p. 3 in petition; printed below.

4. Sections 837 and 838 of Rule XXI of the Rules of the House of Representatives, 75th Congress, House Docu-

ment No. 496, p. 387, 74th Congress, 2d Session; Not Listed on p. 3 in Petition; printed below.

5. The First Deficiency Appropriation Act, fiscal year 1938, c. 42, 52 Stat. 85, 95, 99, Appendix A, petition, pp. 25-26. (Printed with deletions which deletions, however, are important to observe because they show the statutory authorities under which the audited claim of respondent was re-appropriated and certified to Congress under 5 U.S.C. 266, not printed or mentioned in petition (see *supra*, 2 and 3).

6. and 7. The Dockery Act of July 31, 1894, c. 174, sec. 8, 28 Stat. 162, 207, augmented by the Budget and Accounting Act of June 10, 1921, c. 18, sec. 304, 42 Stat. 20, 24; 31 U.S.C. 74. Appendix A, petition, pp. 26-30.

8. The pertinent provisions of the regulations relating to this case, as contained in Executive Order 6657-A, are set forth in Appendix B, petition, pp. 31-32.

V. Statement.

The disputed points are reflected in the transcript of record, especially on pp. 106-11. The court below (Record p. 143) stated that: "In view of the conclusion which we have reached, there is no occasion to relate in detail the facts out of which the instant controversy originated and which the Government alleges resulted in an overpayment to plaintiff." * * * "It was the method or formula to be applied in determining such losses which forms the basis of this controversy. In 1937, the statute and executive order were interpreted in favor of the plaintiff and as a result his claim was allowed. In 1944, long after plaintiff's claim had been allowed and paid, the Government reviewed its prior action, disallowed the claim and sought to recover from the plaintiff. In our view, the action

of the Government in 1944 in revising and determining that the claim had previously been erroneously allowed was unauthorized. It therefore becomes unnecessary to enter any discussion of the merits of the claim or whether the Government in the first instance erroneously interpreted plaintiff's rights under the statute and regulation."

VI. The writ should be denied.

A The statutory provisions and Rules of the House of Representatives eliminated by petitioner (5 U.S.C. 266—cross reference 31 U.S.C. 714 and Secs. 837 and 838 of House Rule XXI) clearly defeat petitioner's alleged issue contesting the finality of adjudication of "claims audited under the authority of the law."

Respondent does not wish to burden this Honorable Court with lengthy and extraneous arguments, but the voluminous petition compels respondent to go beyond the scope of desired brevity by this Court and "when the real situation is not set forth by the petition, a duty rests on opposing counsel to reveal it in their reply." 242 U. S. 430 *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association, Limited et Al.*

In regard to the *first* question presented in their lengthy irrelevant arguments (pp. 9-16) petitioner omits the most important statutory provision, which in unambiguous language prescribes the procedure as to making reports to the Congress covering claims on balances of appropriations. Such unprinted section is quoted below in order to rebut the rather technical argument advanced by petitioner that Congress did not repeat specifically respondent's name in the First Deficiency Appropriation Act 52 Stat. 85, at 95, and therefore did not specifically

"authorize and require" the Secretary of the Treasury to pay a stated sum to an individual named in the act:

Section 714 of Title 31 U.S.C.A., in its effective form, reads:

"BALANCES OF APPROPRIATIONS; REPORTS TO CONGRESS AS TO CLAIMS

> It shall be the duty of the General Accounting Office to continue to receive, examine, and consider the justice and validity of all claims under appropriations the balances of which have been exhausted or carried to the surplus fund under the provisions of section 713 of this title that may be brought before them within a period of five years. The Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration; provided * * * (June 14, 1878, c. 191, par. 4, 20 Stat. 130; July 7, 1884, c. 334, par. 1, 23 Stat. 254; June 10, 1921, c. 18, par. 304, 42 Stat. 24.)"
>
> *Annotations*: Secretary of Treasury, at commencement of each session of Congress, to report amount due claimants whose claims have been allowed to Congress for consideration, see section 266 of Title 5. Executive Departments. Government Officers and Employees.

The last sentence of section 714 U.S.C. 31 is a textual repetition and a cross-reference of 5 U.S.C. 266. The court below used correctly the latter as principal authority in its valued opinion (163 F. 2d 884), coupled with 5 U.S.C. 118 c., granting authority for the payment of losses of exchange due to the appreciation of the Ameri-

can dollar in relation to foreign currencies, including the German mark. This Court's special attention is invited to pages 8 to 10 of the Record (Exhibit "D") from which it will be noted that 4 (four) times reference is made to authority granted under U.S.C. Title 5 Sec. 266.

Respondent's brief to the court below made specific reference to these two sections of statutes (5 U.S.C. 266 and 714 U.S.C. 31) as to the auditing of the claim, and to 5 U.S.C. 118 c. as to the authority for appropriating such money. It is evident from the records examined by the court below that the Secretary of Treasury was required by these two statutory provisions to report to Congress the amount due *each* claimant whose claim has been allowed in whole or in part by the General Accounting Office.

The entire procedure, step by step, of "auditing this claim under authorization of law" is published in House Document No. 498, 75th Congress, 3d Session (Record pages 8 to 10) and it is obvious from the learned opinion of the court below at page 885 in 163 F. 2d that it made a thorough analysis of such Document which is and remains part and parcel of the appropriation act! The court below determined that the schedule transmitted to Congress for appropriation specifically included the name of respondent. Congress consequently and subsequently appropriated for the payment of the claims as *fully set forth* in House Document Numbered 498.

Although a number of claims are added up under each department and category of application or use, in order to arrive at totals of moneys required to be appropriated, the claims *as such* were payable as certified, unless revised while pending, against each certificate of settlement, of which respondent was one of the persons whose claim

had been audited and allowed under the law and regulations in force at the time of auditing and for which he received a preliminary certificate of settlement (Rec. p. 7/8)and a Final Certificate of Settlement (Rec. 113/14).

(Incidentally, judgments reported in the same First Deficiency Appropriation Act in 52 Stat. 85, Sec. 2a for payment of the final judgments and decrees, including cost of suits, rendered under U.S.C. 28, sec. 41, par. 20; sec. 258, secs. 761-765, certified to the Congress in Senate Document Numbered 144, and House Document Numbered 490, are also lump-summed under the various departments and establishments, but such grouping certainly did not bar the individuals mentioned in the judgments to be entitled to payment of their judgments. Even the Comptroller General cannot go beyond such judgments, although under common-law principles in cases where claimants are indebted to the Government, he may set-off prior to payment of such judgments with consent of the plaintiff as provided under par. 227 U.S.C. 31, or bring suit.)

It is therefore submitted that once an audit under law is performed by the General Accounting Office, in the absence of a timely revision made in compliance with the provisions of Section 74 U.S.C. Title 31 while settlement is pending, (*U. S.* v. *Olmstead,* 118 F. 433, 55 CCA 249), under the *Rules of the House of Representatives,* it is considered an award and judgment, and for seventy years it has been held that auditing under authority of law to be "authorization" for the appropriations for the payment of claims.

This fact can be learned best from pars. 837 and 838 under rule XXI as published in: *Constitution, Jefferson's Manual and Rules of the House of Representatives of the*

United States, Seventy-Fifth Congress, House Document No. 496, p. 387, 74th Congress, 2d Session:

Par. 837. The reappropriation of an unexpended balance for an object authorized by law may be made on an appropriation bill (IV, 3591, 3592).

Par. 838. Judgments of courts certified to Congress in accordance with law or authorized by treaty (IV, 3634, 3635, 3644) and auditing under authority of law have been held to be authorization for appropriations for the payment of claims (IV, 3634, 3635). But unadjudicated claims (IV, 3628), even though ascertained and transmitted by an executive officer (IV, 3625-40), and findings filed under the Bowman Act do not constitute authorization. (IV, 3463).

According to the preface of the above-cited manual, "the rulings of the Speakers of the House and of the Chairmen of the Committee of the Whole are to the rules of the House what the decisions of the courts are to the statutes." The above-mentioned precedents and rulings thereon are published in *Hinds' Precedents of the House of Representatives,* vol. IV, and it should be noted that Congress classifies "claims audited under authority of law," together with "judgments of courts certified to Congress in accordance with law or authorized by treaty." Such adjudicated claims carry with it an inherent authorization and do not require a "specific" authorization as urged by petitioner, nor is an examination as to fact or law necessarily the function or duty of Congress, which can be learned from precedent IV, 3638 which makes a complete analysis of these aspects, quotes the jurisdictional text of 5 U.S.C. 266, also Sec. 8 of the Dockery Act as the pertinent statute governing the auditing and the one year limitation of revision of claims and the holding

by the Committee of the Whole that "the finding and judgment of the Comptroller constitute the only legal authority for the payment of the claim." The full text of such precedent was before the court below. (Exhibit CC, item 3 p. 35, Record and verified by exhibits DD and EE telegraphically by the competent Parliamentarian of the House of Representatives, simultaneously indicating that the Congress still considers sec. 8 of the Dockery Act of July 31, 1894 existing law (see below under "B").

It will be observed that the first citation in the credit to the text of 31 U.S.C. 714 (*supra*) is June 14, 1878, c. 191, par. 4, 20 Stat. 130, making it the duty of the several accounting officers of the Treasury (in 1921 substituted by the General Accounting Office) "to continue to *receive, examine, and consider the justice and validity* of all claims under appropriations the balances of which have been exhausted * * *" (Italics supplied). The same type of authority and function will be found involved in the *Price* case (116 U.S. 43), which case the court below used partly in support of its studied opinion. The payment to *Price* was made as a result of an appropriation act of March 3, 1875, 18 Stat. 637, 646, chap. 205, on the basis of a claim reported allowed by the Commissioners of claims under the Act of Congress of March third, eighteen hundred and seventy-one. (1871, c. 116, s. 2, vol. 16 Revised Statutes, p. 824).

A careful review of the latter act will reveal that according to section 2 the President of the United States was authorized to nominate * * * and appoint a board of commissioners as commissioner of claims * * *"whose duty it shall be to *receive, examine, and consider the justice and validity of such claims* as shall be brought before them. * * *" (Italics supplied). And section 4

of the same act contains practically the same provision as the present section of 5 U.S.C. 266 and incorporated in 31 U.S.C. 714:

> "Sec. 4. That said commissioners shall make report of their proceedings, and of each claim considered by them, at the commencement of each session of Congress, to the Speaker of the House of Representatives, who shall lay the same before Congress for consideration; * * *"

In the equally supporting case, *U. S.* v. *City of Louisville* (169 U.S. 249), the Board of Commissions of the Sinking Fund of the City of Louisville, Kentucky, submitted their claim and the First Comptroller audited it, sent his report to the Acting Secretary of Treasury, who transmitted it to The Speaker of the House of Representatives and on February 14, 1891, it was referred to the Committee on Appropriations, being ordered printed by the House of Representatives as Executive Document No. 260, 51st Congress, 2d Session (vol. 36). Under the act of March 3, 1891, c. 540, being an appropriation to supply deficiencies, 26 Stat. 862, at 867, Congress provided "*for payment* (italics supplied) to the city of Louisville, Kentucky, the amount found due, under the act of Congress approved June 16, 1890, and reported to Congress in House Executive Document No. 260, $42,514.03."

Congress and this Court held it to be an audited claim, and payment being made, it was considered final and conclusive on all parties, including any court. The same situation prevailed in the *Price* case analyzed above, and the court below by using the two cited cases in support of respondent's case below, correctly and fully upheld the entire procedure required by Congress and laid down in Section 714 U.S.C. Title 31 and Section 266 U.S.C. Title 5. It recognized clearly and described succinctly the

legal principle that without such an audit and adjudication, no appropriation could be made, and that any untimely or unauthorized revisions of such settlements, would be contrary to the well-established law of the land. This court saying in the *Price* case: "It was when the payment was made and is now, the law of the land that he was entitled to that sum from the United States on account of his claim."

Petitioner relies heavily on the case of *Buchanan* v. *Patterson,* 190 U. S. 355. The original findings in this case were made by the Court of Claims under the so-called *Bowman Act* to persons not specifically named, and such findings did not and do not constitute "authorization" for payment under the long and well-established rule of the House of Representatives (*supra,* and IV, 3643). Nothing in this latter case can be found that can be regarded as relevant or controlling, whereas the *Price-Louisville* cases are definitely applicable and are cited at intervals throughout our legal history in cases in which it is held that the Congressional intention to intrust the determination of the questions therein involved to the discretion of persons or agencies, acting in quasi-judicial, rather than in a ministerial capacity, unless impeached for fraud or mistake of calculation, must be accepted as final and conclusive, and are not subject to review, unless specifically provided for by law, as in 74 U.S.C. 31.

The matter of fraud being specifically denied in this case as a result of a determination by the Attorney General of the United States (record p. 13, item 27), and no claim as to mistake in calculation being made or established, the court below saying on page 144 of Record, that if any mistake was made as alleged by petitioner, it

was a mistake in interpretation of the statutory provision and the executive order issued pursuant thereto as to the method properly employable in determining the amount of plaintiff's loss, it is submitted that the court below did not draw from the *Price-Louisville* cases in its decision any broader rule than that an allowance in this class of cases, including the one at bar, is not an "ordinary" or routine" claim as petitioner is now attempting to purport, but a "statement of accounts by one having authority for that purpose under an act of Congress." It may therefore be safe to conclude that the court below did not unreasonably or at liberty enlarge by construction the plain and unambiguous provisions of the statute through any misapplication of the decisions of this Court.

The federal courts, the General Accounting Office, and some other federal agencies, such as the Veterans Administration, within the scope of their designated statutory jurisdiction are authorized by law to investigate claims against the Government of the United States and determine legal liabilities incurred, but they do not deal with questions of appropriations. The authority of the Congress to make appropriations, within the framework of the Constitution (Art. I, Sec. 9, Clause 7), is plenary and having made such an appropriation on a direct settlement "duly received, examined, and found valid and just" by the General Accounting Office in a certificate of settlement issued specifically to claimant (respondent), and paid without being revised, doubtless constituted a final adjudication and therefore appears to be conclusive on all parties concerned, including any court. (*United States* v. *Price,* 116 U.S. 43, 6 S. Ct. 235, 236, 29 L. Ed. 541; *United States* v. *Louisville,* 169 U.S. 249, 18 S. Ct. 358, 42 L. Ed. 735).

It is considered incumbent upon respondent to correct a drastic error made by petitioner on page 14 (lines 14 to 17) in stating that "claims for amounts chargeable against such funds (unexpended appropriation balances under 31 U.S.C. 713) may be filed at any time up to ten years. (31 U.S.C. 71 (a), 237.

Section 714 U.S.C. 31 (printed in full above) provides specifically that "all claims under appropriations the balances of which have been exhausted or carried to the surplus fund under the provisions of section 713 of this title may be brought before them (the General Accounting Office) within a period of *five* years." (Italics supplied).

The *ten* year limitation applies only to claims or demands (with stated exceptions) against the United States cognizable by the General Accounting Office under sections 71 and 236 of this title (31 Money and Finance) as provided under sections 71 (a) and 237 U.S.C. 31. Section 71 refers to "public accounts to be settled in the General Accounting Office" and section 236 to "meritorious claims against United States not subject to lawful adjustments; submission to Congress by Comptroller General."

The court below clearly recognized this confused and wrong conception of petitioner by bringing an *audited claim* cognizable *only* under Section 714 Title 31 (266 U.S.C. Title 5) under Section 71 U.S.C. Title 31. As to the cases cited by petitioner and repeated in footnote 2 on page 10 of petition, including an inapplicable comment and an attempt to assimilate them with the *Jordan, Price,* and *Louisville* cases decided by this Court, the court distinctly said at p. 886 (163 Fed. 2d): "We think it is unnecessary to cite or discuss these cases for the reason that the rule is without application to the facts of the instant situation."

Furthermore, the court said at p. 886 (163 Fed. 2d) (2):

"The Government, in support of its position, relies strongly upon Title 31 U.S.C.A. section 71, which provides: (Text follows).

"We think this provision is of no benefit to the Government under the circumstances of the instant case. Especially is this so when taken in connection with Title 31 U.S.C.A. section 74, which provides in part: (Text).

Petitioner now comes and attempts to contest the validity of 31 U.S.C.A. Section 74 under question 2 presented above.

B. Petitioner's claim as to the alleged inconsistency and invalidity of 31 U.S.C.A. 74, after checking all available sources with the Committee on the Revision of Laws, House Judiciary, and the Official Codifiers and Custodian of the Statutes, is unfounded and is still considered existing law.

On page 16 of his petition it is stated that "the court below also held that the Comptroller General's authority to revise the settlement of a claim is limited to one year by 31 U.S.C. 74." Petitioner continues to state:

> While *concededly* 31 U.S.C. 74, in its present form does contain this limitation on the power of the Comptroller General, and, if valid, barred the revision here involved, we submit that in its present form 31 U.S.C. 74 is an erroneous codification of the basic statutes." (Italics supplied.)

Petitioner prints the material portion of Section 8 of the Dockery Act on page 17 and introduces such re-print with words to the effect that "the citations in the credit to the test of 31 U.S.C. 74 are section 8 of the Dockery Act of July 31, 1894, c. 174, 28 Stat. 207, and Section 304 of the Budget and Accounting Act of June 10, 1921, c. 18, 42 Stat. 24."

The *full* text of these two sections involved are reprinted in Appendix "A" to petition, pp. 26-28 (items 3 and 4). Under item 5 petitioner prints the text of 31 U.S.C. 74 as originally codified in the 1926 edition of the United States (which edition temporarily eliminated the provision concerning the conclusiveness of balances certified and the revisions to be obtained by the three parties named).

Careful research work of the official codifiers, in preparing the United States Code Annotated, discovered no specific authority for the change from the wording of the Statutes-at-Large, and, therefore, appended a caveat in the third paragraph of the "Historical Note," reading:

> "Prior to its incorporation into the Code, this section contained further provisions concerning the conclusiveness of balances certified, revision by the Comptroller of the Treasury, etc. but that "they were probably omitted as superseded by Act June 10, 1921, c. 18, particularly sections 301, 304, and 310."

Prior to the hearing before the court below, these official compilers advised respondent that very probably because of this editorial note in the United States Code Annotated, Congress later decided as a result of several complaints and letters from the Bench and Bar that the omission that it originally made when compiling the United States Code was not justified and in Supplement V (1931), of which they supplied a photostat, and in subsequent cumulative supplements VI and VII to the United States Code, it published the text of the present form of 31 U.S.C. 74 with an explicit statement underneath:

"THIS SECTION HAS BEEN RESTATED TO EXPRESS EXISTING LAW."

Upon printing the new Code of the Laws of the United States in force January 3, 1935 (1934) edition and the 1940

edition, in force on January 3, 1941, this re-stated section was carried on in both editions and still reads as shown under item 6 on pages 29-30 in Annex "A" of the petition, and these editions were in force when the Comptroller assumed authority to act contrary to the one-year limitation expressed in U.S.C. 74.

According to the preface to the First Edition of the Code (1926) "the presumption (of inconsistencies) is rebuttable by production of prior unrepealed Acts of Congress at variance with the Code. Because of such possibility of error in the Code and of appeal to the Revised Statutes and Statutes at Large, a table of statutes repealed is published therein." Petitioner does not offer any such rebuttal of repeal; the custodian of the statutes, the State Department of the United States, under whose supervision the statutes are printed, could not find any express repeal, and a most thorough search by the Committee of the Revision of Laws, House Judiciary, under whose supervision the Codes and Supplements are published, based on the authority provided by Joint Resolution of March 3, 1929 (H. J. Resolution 399—Pub. Res. No. 101) c. 586, 45 Stat. 1540, at 1541 section 2a is convincing that the statement in the Vth Supplement (1931) expressing that Section 74 U.S.C. 31 "HAS BEEN RESTATED TO EXPRESS EXISTING LAW" was and is still correct and that petitioner's allegation of inconsistency and invalidity could find no support.

The parallel Reference Table II in the Codes show as unrepealed Statutes at Large: Act of July 31, 1894, c. 174, s. 8, vol. 28, p. 207 . . . . 31 U.S.C. 74.

Section 304 of the Budget and Accounting Act of June 10, 1921, c. 18, 42 Stat. 24 was correctly published in all editions of the U. S. Code in Section 44 of Title 31. It

transferred certain powers and duties to the General Accounting Office and to the Comptroller General, wherefore the term "the Comptroller of the Treasury" was textually substituted by "the Comptroller General" in 74 U.S.C. 31. The fact that the 1926 edition of the U. S. Code incompletely stated section 74 Title 31 is immaterial. It was corrected by the Vth supplement (1931) and the pertinent section was restated by Congress to express "existing law."

The Comptroller General, when he assumed his duties in 1921, considered it "existing law" in his own circular 1921 No. 2, dated August 23, 1921, published in *1 Comp. Gen. 775*, at *776* under the title: *Revision, Reopening, or Review of Audited Settlements;* this circular letter clearly indicates under subsection (4) that the Comptroller General is listed among the officers and persons by whom the revision of settlements may be obtained within one year from the date of the settlement by the Comptroller General. It remained unchanged in effect because it is cited and repeated in the *Code of Federal Regulations of the United States* (1939), Title 4, Accounts, Chapter 1, General Accounting Office, Part 2, Revision, Reopening, Review of Settlements, Section 2.1.

Petitioner's claim of invalidity of section 74 U.S.C. Title 31 is obviously unfounded and the Court below certainly did not err in holding that the revision by the Comptroller General of respondent's settled and paid account was without authority because it was made more than one year after settlement, thus leading unavoidably to the conclusion that petitioner was guilty of laches, wherefore it is respectfully submitted that the court's opinion of October 13, 1947 (163 Fed. 2d, 884) should stand as written, thereby "attributing to the circuit court of appeals a prestige which invites reliance for the burdens of appellate review."

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C. The decision below conforms to the applicable statutory provisions and House rules as well as to decisions of this Court; is not in conflict with decisions rendered by other Circuit Courts, and does not involve principles of far-reaching effect, overthrow administrative fiscal construction or diminish the power of the Comptroller General.

As shown above under chapter VI (A), the decision below conforms to the applicable statutory provisions and House rules as well as to decisions of this Court. It is evident that the court's first holding did not result from a complete misapprehension of the applicable decisions of this Court. It correctly and admirably upheld the Vth Amendment of our Constitution and also observed constitutional law to the extent that "the judiciary cannot go behind an act of Congress, to show motives of Legislature, or from whence it derives its knowledge." (*Baker* v. *U. S.* 27 F. 2d 863, at 876, citing *U. S.* v. *Price,* 116 U. S. 43.) The decision below is therefore not in conflict with the foregoing decision rendered by another Circuit Court and conforms to the decision rendered in *U. S.* v. *Olmstead,* 118 F. 433, 55 CCA 249.

While the decision below in its clarifying form of studied accuracy may affect adversely some unwarranted procedures in the administration of the fiscal affairs of our government, it is the view of respondent that the two questions of federal law presented by petitioner by means of important omissions disclosed above, aided by considerable irrelevant make-weight and confusion, are not of such importance and substance or involve principles of far-reaching effect, overthrow administrative fiscal construction or diminish the power of the Comptroller General of the United States. (*United States* v. *Riner,* 230 U. S. 547).

For instance, on page 16 of the petition an attempt is made to impress this Court that Congress has modified the

procedure in recent years, beginning with the First Deficiency Appropriation Act, 1945, c. 95, 59 Stat. 77, 90. Such *exceptional* legislation (enacted eight years after respondent's claim was finally and conclusively settled and paid) is irrelevant and is a one-time legislation limited to certified claims up to $500.00 covering two fiscal years only (1945 and 1946) arising in the Bureau of Accounts of the Treasury Department. It did NOT repeal, change, effect or create inequitable results within the meaning of the long established statute or intentions thereunder, enacted as 714 U.S.C.A. Title 31 (5 U.S.C.A. 266). A few pages onward in c. 95, 59 Stat. at 94 appropriations will be found duly made under Sec. 304 for the payment of claims certified to be due by the General Accounting Office * * * under 5 U.S.C. 266, including claims on foreign currency; in c. 589, same statute 59 Stat. 632, at 657, Sec. 204 similar "audited claims" are granted appropriations.

The several cases of overtime pay listed in footnote 7 page 22 of petition were NOT "balances certified by the General Accounting Office to Congress" BUT judgments made in the Court of Claims and reviewed on certiorari to that court by this Court. Section 74 U.S.C. Title 31 obviously has no bearing whatsoever on such judgments and decrees of the Court of Claims for which a review is provided under section 288 U.S.C. Title 28.

Furthermore, considerable irrelevant make-weight is included in Record pp. 38-102. Not one of these decisions by the Comptroller General refers to claims audited under authority of law. (5 U.S.C. 266—31 U.S.C. 714).

Error is also assigned to footnote 6 of page 22 of petition. While it is admitted under the cases cited that the right of set-off is inherent in the United States Government and is grounded in the common-law right of every

creditor to apply the moneys of his debtor in his hands to the extinguishment of claims due him from the debtor, it is settled that such right of set-off is not enforceable so far as concerns the withholding of current compensations to officers and employees still in the Federal Service. See *Smith* v. *Jackson* 246 U. S. 388 and record p. 5 item 22; action of withholding can be brought only within the narrow category and defined particularity of the Act of May 26, 1936 (c. 452, 49 Stat. 1374)—5 U.S.C. 46 (b). See record p. 4 item 20. (The court below, deciding the primary issue in favor of respondent, did not find it necessary to decide whether the Government had a right to set off the alleged overpayment against monies advanced and otherwise due respondent.)

CONCLUSION.

For the reasons stated above (VI A to C), it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,
JULIUS L. KABAKER,
Counsel for Respondent,
Member of the Bar of the Supreme Court of the United States.

JOHN V. CLINNIN,
Attorney-at-Law.
Of Counsel
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